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No. 02-1205

IN THE

Supreme Court of the United States

EDITH JONES, *et al.*,
Petitioners,

v.

R.R. DONNELLEY & SONS COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

ANN ELIZABETH REESMAN
Counsel of Record
MCGUINESS NORRIS & WILLIAMS, LLP
1015 Fifteenth St., N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600

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BRIEF OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae* with the consent of the parties.[1] The brief urges affirmance of the Seventh Circuit's decision below, and thus supports the position of the respondent, R.R. Donnelley & Sons Company.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to

[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief. A letter of consent from counsel for each party has been filed with the Clerk of the Court.

promote sound policies and programs to end employment discrimination. Its membership now comprises more than 330 of this nation's largest private sector companies, collectively employing over 20 million people throughout the United States.

EEAC members are firmly committed to the principles of nondiscrimination and equal employment opportunity. Nevertheless, as large employers, they are subject to suits under numerous antidiscrimination laws, including 42 U.S.C. § 1981. As potential defendants in such actions, EEAC members have a direct interest in the issue presented to the Court in this case—*i.e.*, whether, as the Seventh Circuit concluded below, all Section 1981 claims are governed by the forum state's personal injury statute of limitations, or as the petitioners contend, some Section 1981 employment discrimination claims are governed instead by the four-year, federal "fall-back" statute of limitations codified at 28 U.S.C. § 1658.

The issue is of great practical importance to EEAC's members, the vast majority of which have employees in multiple states. Most states' statutes of limitations preclude personal injury claims not brought to court within two or three years. In those states, adoption of the rule advocated by the petitioners, as opposed to the one applied by the Seventh Circuit in this case, would greatly expand the number and scope of stale claims that potentially could be brought against employers under Section 1981.

Because of its members' interest in the scope of Section 1981 as applied to employment, EEAC filed *amicus curiae* briefs in many of the cases cited in the parties' briefs and lower court opinions in this case, including *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987), *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), and *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994). Thus, EEAC's interest in, and experience with, the issue presented for the Court's consideration in this case are both substantial and long-standing.

STATEMENT OF THE CASE

This case began with the filing of a complaint in the Northern District of Illinois on November 25, 1996, alleging that R.R. Donnelley & Sons Company violated 42 U.S.C. § 1981 by, *inter alia*, discriminating against African-Americans whose employment it had terminated in conjunction with the closing of its Chicago Manufacturing Division (CMD) on or about July 29, 1994. The plaintiffs' claims included allegations of discriminatory terminations, discriminatory transfers, and maintenance of a racially hostile work environment.

Donnelley moved for summary judgment on all claims by the former CMD employees on the ground that their employment had ended more than two years before the filing of their complaint, and their claims therefore were time-barred. Donnelley relied on the traditional rule that, because Section 1981 does not contain a statute of limitations, courts considering Section 1981 claims will apply the personal injury statute of limitations of the state in which the claims arise, which in Illinois is two years.

The district court denied the motion. It ruled in *Adams v. R.R. Donnelley & Sons Co.*, 149 F. Supp.2d 459, 462-64 (N.D. Ill. 2001)[2], that the discriminatory termination and hostile environment claims in this case were governed, not by the two-year Illinois statute of limitations, but rather by the four-year, federal "catch-all" statute of limitations codified at 28 U.S.C. § 1658, which applies to any "civil action arising under an Act of Congress enacted after [December 1, 1990]."

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[2] *rev'd sub nom. Jones v. R.R. Donnelly & Sons Co.*, 305 F.3d 717 (7th Cir. 2002), *cert. granted*, 123 S. Ct. 2074 (2003).

The district court reasoned that, because allegations of race discrimination in termination of employment and maintenance of a racially hostile work environment were not actionable under Section 1981 as interpreted by this Court in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), but became actionable as a result of the amendment to Section 1981 contained in the Civil Rights Act of 1991, the termination and hostile environment claims in this case were claims "arising under" the Civil Rights Act of 1991. *Id.* And, since the 1991 Act was enacted after Section 1658's effective date of December 1, 1990, the district court concluded that Section 1658's four-year statute of limitations applied to those claims.[3] *Id.* at 465. Accordingly, the district court denied Donnelley's motion for summary judgment, *id.*; however, it certified the statute of limitations question for interlocutory appeal.

On review, the Seventh Circuit reversed. *Jones v. R.R. Donnelley & Sons Co.*, 305 F.3d 717 (7th Cir. 2002), *cert. granted*, 123 S. Ct. 2074 (2003). The court of appeals concluded that all of the petitioners' Section 1981 claims arose under the original, prohibitory language of Section 1981, not under the new, definitional provision added by the Civil Rights Act of 1991. *Id.* at 727. Having thus found that the claims arose under a preexisting statute, the Seventh Circuit held that Section 1658 did not apply and that all of the petitioners' claims were subject to Illinois' two-year statute of limitations. *Id.* at 728.

The Third and Eighth Circuits also have found Section 1658 inapplicable to Section 1981 claims. *Zubi v. AT&T Corp.*, 219 F.3d 220 (3d Cir. 2000); *Madison v. IBP, Inc.*, 257

[3] The district court reserved judgment on whether other types of discrimination alleged in the complaint might have been actionable under Section 1981 before the 1991 amendments, and therefore might be subject to the two-year Illinois limitations period. *Id.* at 465.

F.3d 780 (8th Cir. 2001), *vacated on other grounds*, 536 U.S. 919 (2002). The Sixth and Tenth Circuits have reached the opposite conclusion. *Anthony v. BTR Auto. Sealing Sys., Inc.*, 339 F.3d 506 (6th Cir. 2003); *Harris v. Allstate Ins. Co.*, 300 F.3d 1183 (10th Cir. 2002). This Court granted certiorari to resolve the conflict in the circuits.

SUMMARY OF ARGUMENT

The court of appeals correctly concluded that all civil actions for discrimination in employment under 42 U.S.C. § 1981 are actions "arising under" an Act of Congress that predates 28 U.S.C. § 1658's effective date of December 1, 1990, and therefore are not subject to Section 1658's four-year statute of limitations. Indeed, the only provision of Section 1981 that provides a right of recovery for discrimination of any kind predates Section 1658's effective date by well over a century. It is the guarantee, enacted by Congress shortly after the Civil War and now codified in subsection (a) of Section 1981, that "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . ." 42 U.S.C. § 1981(a).

The 1991 amendment to Section 1981, codified in subsection (b), merely added definitional language specifying that the preexisting term "make and enforce contracts" includes "the making, performance, modification, and termination of contracts and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). Although this new language expanded the scope of the term "make and enforce" to encompass post-formation conduct not previously comprised within that term as interpreted in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), the 1991 amendment did not create any new right of action under Section 1981. Rather, as the court of appeals correctly recognized, "the cause of action

for post-formation conduct 'aris[es] under' § 1981(a); that subsection, not subsection (b), provides the actual right to recovery." *Jones v. R.R. Donnelley & Sons Co.*, 305 F.3d 717, 727 (7th Cir. 2002), *cert. granted*, 123 S. Ct. 2074 (2003).

If there were any ambiguity in the meaning of Section 1658 as it relates to Section 1981 claims, one would need only to look to the history and purposes of the respective 1990 and 1991 legislative enactments to find that Congress did not intend the four-year "catch-all" statute of limitations to apply to such claims. As the Seventh Circuit recognized, Congress enacted Section 1658 to alleviate confusion and elected to make it prospective so as not to disrupt litigants' settled expectations regarding applicable statutes of limitations. *Id.* at 725-27. It is difficult to imagine a rule more confusing and inherently disruptive than the one advocated by the petitioners here, which would require litigants and courts to sift through Section 1981 complaints and apply one statute of limitations to claims determined to be actionable under the law as interpreted in *Patterson* and a different statute of limitations to claims determined to be actionable under the new definition added by the Civil Rights Act of 1991.

When Congress enacted the Civil Rights Act of 1991, it clearly was aware of the "catch-all" federal statute of limitations it had enacted just a year earlier. As the court of appeals recognized, Congress also was well aware of the courts' longstanding practice of applying the personal injury statute of limitations of the forum state to claims under Section 1981. *Id.* at 727. Against that backdrop, Congress opted in 1991 not to create a wholly new cause of action for discrimination in termination of employment or treatment of employees, but instead "merely supplied a more precise definition to one of the rights already guaranteed by § 1981—the right to 'make and enforce contracts.'" *Id.* Thus, as the court of appeals recognized, it is apparent that Congress did not view the passage of Section 1658 "as having altered the

practice of borrowing state statutes of limitations for purposes of § 1981." *Id.*

Statutes of limitations serve an important function in our legal system—to prevent litigation of stale claims. Such litigation is onerous in the employment context. With the passage of time, memories fade, witnesses scatter and records become unavailable. Indeed, many employment records lawfully may be destroyed after as little as one year under current federal regulations. The majority of all the states' personal injury statutes of limitations are two years; some are three years; very few are longer than four years. Thus, the net effect of the position urged by the petitioners in this case would be to increase dramatically the number of stale allegations of discriminatory employment terminations, transfers, denials of promotion, and on-the-job treatment that could be litigated under Section 1981 throughout the United States. This Court should not endorse such a result without a clear direction from Congress, which Section 1658 does not provide.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT ALL SECTION 1981 ACTIONS "ARISE UNDER" AN ACT OF CONGRESS THAT PREDATES THE EFFECTIVE DATE OF 28 U.S.C. § 1658 AND THEREFORE ARE NOT SUBJECT TO THE FOUR-YEAR "CATCH-ALL" FEDERAL STATUTE OF LIMITATIONS.

A. Section 1658's Four-Year Statute of Limitations Applies Only to Actions "Arising Under" Acts of Congress Enacted After December 1, 1990.

This case hinges on the meaning of "arising under" in 28 U.S.C. § 1658. Section 1658 creates a four-year statute of

limitations where one is not otherwise provided by law, but *only* for civil actions "arising under" Acts of Congress enacted after its effective date, December 1, 1990. It states, in pertinent part:

> (a) Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.

28 U.S.C. § 1658(a). By limiting this new "catch-all" statute of limitations exclusively to actions "arising under" laws enacted after its effective date, Congress clearly made Section 1658 prospective only. The question presented in this case thus boils down to whether the Act of Congress under which the petitioners' claims arise was enacted before or after December 1, 1990.

B. The Court of Appeals Correctly Recognized That All Section 1981 Suits Alleging Employment Discrimination Are Actions "Arising Under" the Ban on Discrimination in the Making and Enforcement of Contracts, Which Congress Enacted Over a Century Before the Effective Date of Section 1658.

The petitioners base all of their claims of discrimination on the law commonly known as "Section 1981"—*i.e.*, 42 U.S.C. § 1981. That law consists today of two subsections relevant here. The first was enacted in the Reconstruction Era immediately following the Civil War. It states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Rev. Stat. § 1977.[4] More than 100 years later, in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), this Court held that the foregoing statutory language affords individuals a right to sue in federal court for intentional, race-based discrimination in employment. Subsequently, in *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987), the Court held that, because Section 1981 does not contain its own statute of limitations, courts in Section 1981 cases should apply the statute of limitations provided under state law for personal injury actions in the forum state.

The second subsection of Section 1981 was enacted in 1991, when Congress, as part of the Civil Rights Act of 1991, amended the provision quoted above by designating it as 1981(a) and adding a new subsection 1981(b), which states:

> (b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

Pub. L. No. 102-166, 105 Stat. 1071 (42 U.S.C. § 1981(b) of the Civil Rights Act of 1991). Congress added this definitional provision in response to the decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), in which this Court read the original language of Section 1981 as extending to the formation of an employment contract, but not to

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[4] The above-quoted language was enacted in its present form as Section 16 of the Civil Rights Act of 1870, ch. 114, § 16, 16 Stat. 140, 144 (Act of May 31, 1870). It was patterned after similar language contained in Section 1 of the Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (Act of Apr. 9, 1866).

"conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions." *Id.* at 177.

The question presented here is whether the petitioners' claims, which allege discrimination in terminations of employment and treatment of employees occurring more than two, but less than four, years before they filed their complaint, "aris[e] under" 1981(a) or under 1981(b). If the former, then under the rule of *Goodman v. Lukens Steel*, the claims are subject to Illinois' two-year statute of limitations for personal injuries, and thus are clearly time-barred. If the latter, they may be subject to the prospective, four-year statute of limitations in Section 1658, and thus still may be viable.

A review of the language of the two subsections of Section 1981 makes the answer eminently clear. There can be no civil action "arising under" § 1981(b), because it is purely a definitional section. It creates no right and conveys no right of action; it merely elaborates the meaning of the right, created by § 1981(a), to "make and enforce contracts" on the same terms as "white citizens." A legal action cannot arise under a definition alone; it can arise only under a statutory provision that creates a right. Thus, the cause of action for any alleged violation of Section 1981 necessarily "aris[es] under" § 1981(a), for that subsection alone guarantees the "right to make and enforce contracts"—whatever scope and meaning Congress and the courts impart to that right.[5]

[5] Judge Cole correctly recognized this point in his concurring opinion in *Anthony v. BRT Automotive Sealing Systems, Inc.*, 339 F.3d 506, 517-18 (6th Cir. 2003), and therefore, did not join the panel majority's holding that claims of discriminatory denial of promotions were governed by 28 U.S.C. § 1658's four-year statute of limitations.

As the Seventh Circuit correctly observed, this conclusion follows inexorably from the language and structure of Section 1981:

> The most salient feature of the revised statute is that § 1981(b) simply cannot stand on its own. An action to recover for discriminatory post-formation treatment simply cannot be based solely on § 1981(b). Indeed, without § 1981(a), § 1981(b) is meaningless. Consequently, although post-formation discrimination claims depend on the amendatory language of § 1981(b) in the sense that the definitional language of that subsection makes clear that "make and enforce" includes post-formation conduct, the cause of action for post-formation conduct "aris[es] under" § 1981(a); that subsection, not subsection (b), provides the actual right to recovery.

Jones, 305 F.3d at 727.

In sum, since the sole right of action the petitioners assert in their lawsuit is one that has existed as a federal statute *in haec verba* since 1870, their lawsuit is not governed by the prospective statute of limitations Congress adopted for actions arising under federal laws enacted after December 1, 1990. Rather, like all claims under Section 1981, it is subject to the applicable statute of limitations of the forum state.

II. THE HISTORY AND PURPOSES OF 28 U.S.C. § 1658 AND THE CIVIL RIGHTS ACT OF 1991 CONFIRM THAT CONGRESS DID NOT INTEND THE NEW, FOUR-YEAR STATUTE OF LIMITATIONS TO APPLY TO EMPLOYMENT DISCRIMINATION CLAIMS UNDER SECTION 1981.

The *amicus* believes that the meaning of "arising under" is clear on its face and, for the reasons discussed above, requires the conclusion that the statute of limitations for all Section

1981 claims is the same—*i.e.*, the forum state's limitations period for personal injury claims. Recognizing, however, that some lower courts have found Section 1658 ambiguous as applied to claims that arguably "aris[e] under" statutes originally enacted before December 1, 1990, but amended after that date, this Court may wish to refer to the legislative history and purposes of Section 1658 and the Civil Rights Act of 1991. If so, the Court will find confirmation of the correctness of the Seventh Circuit's decision in this case.

As the court of appeals recognized, Congress enacted Section 1658 in an effort to eliminate confusion about the appropriate statutes of limitations to be applied in cases arising under federal statutes that do not contain their own limitations periods. *Jones*, 305 F.3d at 725-26. *See also Anthony v. BTR Auto. Sealing Sys., Inc.*, 339 F.3d 506, 517-18 (6th Cir. 2003) (concurring opinion of Judge Cole). Congress wished to alleviate the "uncertainty" to which litigants are subjected in the absence of a clearly predetermined limitations period. H.R. Rep. No. 101-734, at 24 (1990). At the same time, Congress opted to make Section 1658 prospective only, so as not to disrupt settled expectations of persons who might wish to litigate claims arising under statutes whose limitations periods had already been determined by judicial decision. *Id.*

This Congressional objective of alleviating uncertainty and settling expectations would be severely undermined by the rule advocated by the petitioners in this case. Under their approach, different claims in the same Section 1981 suit would be subject to different statutes of limitations. Courts and litigants would be required to parse through Section 1981 complaints and attempt to distinguish between claims that would have been actionable under this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), and claims that became actionable only as a result of the 1991

Civil Rights Act's amendment to Section 1981. The results predictably would be chaotic, particularly in large class actions under Section 1981.

This case demonstrates the muddle. Under Petitioners' and the Government's theory, Petitioners' termination and hostile environment claims are timely under Section 1658. On the other hand, their job classification as temporary employees, an issue the district court declined to address,[6] may be viewed as "contract formation" and therefore be time-barred.

The Third Circuit aptly described this chaos in *Zubi v. AT&T Corp.*, 219 F.3d 220 (3d Cir. 2000), in rejecting the approach the plaintiffs' advocate here. The court noted that:

> [The plaintiffs'] interpretation results in different statutes of limitations being applied to plaintiffs suing under the same statute depending on the particular facts of their claims. Thus, for example, plaintiffs who invoke § 1981 because they have been victims of discrimination in hiring will have their claims governed by one statute of limitations, while plaintiffs who invoke the same statute because they are victims of a discriminatory discharge will have their claims governed by another [statute of limitations].

Id. at 224. Thus, as the Third Circuit went on to observe, the plaintiff's approach would "generate exactly the kind of confusion and unfairness that Congress sought to avoid" when it enacted Section 1658 in 1990. *Id.*

Congress, moreover, was well aware just a year later, when it undertook to overrule this Court's *Patterson* decision as part of the Civil Rights Act of 1991, of the established judicial practice of applying the forum state's personal injury statute of limitations to all actions for discrimination in the making and enforcement of contracts under Section 1981.

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[6] *See* note 3, *supra*.

See H.R. Rep. No. 102-40(I), at 63 (1991), *reprinted in* 1991 U.S.C.C.A.N. at 549, 601. Indeed, Congress expressly noted that Section 1981 claims typically were subject to limitations periods of "two to three years, and . . . up to six years in some states." *Id.* (footnote omitted). *See also* H.R. Rep. No. 102-40(II), at 22 n.32 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 716 n.32. Yet it chose not to enact a separate, new statute prohibiting the types of post-formation discrimination in employment contracts that the plaintiff in *Patterson* had attempted to litigate under Section 1981. Instead, Congress opted simply to amend Section 1981 to bring "performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship" within the existing statutory guarantee of the same right to "make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981.

Thus, it can only be inferred that the 1991 Congress intended allegations of post-hire employment discrimination to be subject to the same limitations period as other alleged violations of the existing statutory guarantee already set forth in Section 1981. This conclusion follows not only from the presence of the above-cited, express references to the established practice of applying analogous state statute of limitations to Section 1981 claims, but also from the absence of any mention, anywhere in the legislative history of the Civil Rights Act of 1991, of the four-year "catch-all" statute of limitations enacted the preceding year in Section 1658.

It is noteworthy in this regard that, in enacting the Civil Rights Act of 1991, Congress was particularly attentive to statute of limitations issues it viewed as problematic. Thus, in Section 112 of the 1991 Act, Congress amended § 706(e) of Title VII, 42 U.S.C. § 2000e-5(e), to alter the rule of law handed down in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), concerning when Title VII's statute of limitations begins to run in cases involving the application of

intentionally discriminatory seniority systems. Also, in Section 115 of the Civil Rights Act of 1991, codified at 29 U.S.C. § 626(e), Congress replaced the then-existing two- and three-year statutes of limitations under the Age Discrimination in Employment Act (ADEA)[7] with a requirement that civil actions be filed within 90 days after a charging party's receipt of notice that the Equal Employment Opportunity Commission (EEOC) has dismissed or otherwise terminated proceedings on a charge of age discrimination. Similarly, in Section 114 of the Civil Rights Act of 1991, Congress amended 42 U.S.C. § 2000e-16(c) to provide that federal sector complainants would have 90 days, rather than 30 days, within which to file suit after any of various triggering events specified in that subsection.

In sum, Congress was fully cognizant of the time-limits applicable to suits under each of the statutes it amended as part of the Civil Rights Act of 1991, and it acted affirmatively to fix those it thought needed fixing. It surely also was well aware of the "catch-all" statute of limitations it had enacted just a year earlier in Section 1658. Against this background, the fact that Congress amended a definitional provision of Section 1981 but did not make any provision for a new or different statute of limitations for actions brought under that section further confirms the Seventh Circuit's conclusion: Congress simply did not view the passage of Section 1658 "as having altered the practice of borrowing state statutes of limitations for purposes of § 1981." *Jones*, 305 F.3d at 727.

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[7] The ADEA previously had provided a two-year period for filing suit for non-willful violations and a three-year period for filing suit for willful violations.

III. IN THE ABSENCE OF A CLEAR DIRECTION FROM CONGRESS, THIS COURT SHOULD NOT ADOPT AN INTERPRETATION OF SECTION 1658 THAT WOULD VASTLY INCREASE LITIGATION OF STALE CLAIMS OF EMPLOYMENT DISCRIMINATION.

Whenever Congress has enacted a law designed specifically to provide a right of action for employment discrimination, it has included time-limits to prevent litigation of stale claims. In Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et-seq*., for example, Congress imposed a dual scheme of time-limits. First, it stipulated that a person alleging an unlawful employment practice must file a timely administrative charge within 180 or 300 days after the occurrence of the alleged unlawful practice. 42 U.S.C. § 2000e-5(e)(1).[8] Second, Congress specified that an individual claiming to be aggrieved under Title VII has 90 days within which to bring a civil action after receipt of a "notice of right to sue" from the EEOC pursuant to 29 C.F.R. § 1601.28. 42 U.S.C. § 2000e-5(f)(1). Congress later made these same time-limits applicable to proceedings under Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111-12117, and as noted above, applied a similar 90 limit to actions under the Age Discrimination in Employment Act. 29 U.S.C. § 626(e).

As this Court has recognized, such time-limits serve a valuable purpose in employment discrimination statutes: "The limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending claims arising from employment decisions that are long past."

[8] The time-limit is 300 days in "deferral" states (*i.e*., states having their own agencies with authority to grant or seek relief from the alleged employment practice), and 180 days in non-deferral states. *Id*.

Delaware State Coll. v. Ricks, 449 U.S. 250, 256-57 (1980) (quoting *Johnson v. Railway Express Agency, Inc*., 421 U.S. 454, 463-64 (1975)). As this Court went on to observe:

> It should not be forgotten that time-limitations provisions themselves promoted important interests; "the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones."

Ricks, 449 U.S. at 259-60 (1980) (quoting *Johnson*, 421 U.S. at 463-64). *See also Mohasco Corp. v. Silver*, 447 U.S. 807, 820 (1980) (Title VII's charge-filing time-limit reflects a congressional "judgment that most genuine claims of discrimination would be promptly asserted and that the costs associated with processing and defending stale or dormant claims outweigh the federal interest in guaranteeing a remedy to every victim of discrimination").

Although Congress has not subjected civil actions for employment discrimination under Section 1981 to the same time-frames as civil actions brought under Title VII, the burden this Court recognized in *Ricks* of "defending claims arising from employment decisions that are long past," 449 U.S. at 256-57 (citations omitted), is no less for employers in cases brought under Section 1981 than under Title VII. Regardless of the statute under which a case is brought, litigants and fact-finders are likely to confront serious obstacles when faced with claims based on workplace events dating back more than two or three years.

As the Fifth Circuit has observed, statutes of limitations "reflect the valuable policy of requiring 'the prompt vindication of known rights to assure that the defendant is not prejudiced as a result of lost evidence, fading memories, and disappearing witnesses.'" *Jones v. Alcoa, Inc*., 339 F.3d 359, 367 (5th Cir. 2003) (citation omitted). In today's business world, rapid change and worker mobility are the orders of the

day. In this environment, intervals of more than two or three years can be like an eternity. Companies change hands. Operations are restructured. Employees leave to go to other companies, other industries, and even other parts of the world. Memories fade. Employment records disappear or become unavailable.

Federal employment record-keeping regulations reflect at least some recognition by the employment-law enforcement agencies of the burdensomeness to employers of having to keep employment records for inordinately long periods of time. Thus, they generally limit mandatory record-retention periods, except insofar as they are relevant to pending administrative charges or lawsuits. For example, under the applicable regulation of the EEOC, the mandatory retention period for most employment records is one year. 29 C.F.R. § 1602.14.[9] Many large companies take the more cautious approach of preserving employment records until the limitations period for a possible Section 1981 action has expired. Adoption of the position advocated by the petitioners in this case would effectively require employers taking this approach to save *all* employment records for at least four years, even

[9] 29 C.F.R. § 1602.14 states in pertinent part:

> Any personnel or employment record made or kept by an employer (including but not necessarily limited to requests for reasonable accommodation, application forms submitted by applicants and other records having to do with hiring, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation and selection for training or apprenticeship) shall be preserved by the employer for a period of one year from the date of the making of the record or the personnel action involved, whichever occurs later . . . . Where a charge of discrimination has been filed, or an action brought by the Commission or the Attorney General, against an employer under title VII or the ADA, the respondent employer shall preserve all personnel records relevant to the charge or action until final disposition of the charge or the action.

where no charge or lawsuit has yet been filed. This would add enormously to the record-keeping burden already faced by employers.

EEAC's research indicates that in in the vast majority of the 50 states of the United States, the statute of limitations for personal injury claims is three years or less.[10] Under the position advocated by the petitioners in this case, plaintiffs in those states still would have to bring claims alleging discriminatory refusal to hire under Section 1981 to court within these two- or three-year time-frames, but they could sit back and let claims alleging discrimination in termination of employment or treatment during the course of employment gather dust for as long as four years before bringing them to court. A few states currently have 4-year statutes of limitations for personal injury claims, and thus would appear to be unaffected by the petitioners' approach.[11] A few others have statutes of limitations longer than four years for such claims.[12] In those few states, adoption of the petitioners' position presumably would mean that plaintiffs would have to bring claims of discrimination in respect to termination or treatment during employment to court within four years, but could still wait up to five or six years to file suit on claims of discrimination in hiring.

Thus, in the vast majority of all states, the net effect of the petitioners' position would be to increase very substantially the number and potential scope of stale claims of employment discrimination that could be brought to the courts to be litigated. At the same time, it would subject parties and

[10] *See generally, State Statutes of Limitations as Affecting Federal Civil Rights Actions Under 42 U.S.C.A. § 1981*, 29 A.L.R. Fed. 710 (1976 & Supp. 2002).

[11] *E.g.*, Fla. Stat. § 95.11(3)(o); Wyo. Stat. Ann. § 1-3-105.

[12] *E.g.*, Mo. Rev. Stat. § 516.120(4) (five years); Me. Rev. Stat. tit. 14, § 752 (six years).

courts in Section 1981 actions to the unwieldy exercise of having to apply different statutes of limitations to different claims in the same case, based on a determination as to whether the particular type of conduct alleged in each particular claim would have been actionable under this Court's holding in *Patterson v. McLean Credit Union* or only became actionable as a result of the Civil Rights Act of 1991. In the absence of any clear indication that Congress intended such bizarre results when it enacted Section 1658, and in the face of clear evidence that Congress, in fact, did *not* intend to subject Section 1981 actions to the four-year "catch-all" limitations period when it amended Section 1981 as part of the Civil Rights Act of 1991, this Court should eschew an interpretation of Section 1658 that would spawn such an increase in potential litigation of stale claims and impose such onerous additional burdens on employers and courts.

CONCLUSION

For the reasons stated above, this Court should affirm the decision of the Seventh Circuit in this case.

Respectfully submitted,

ANN ELIZABETH REESMAN
Counsel of Record
MCGUINESS NORRIS &
WILLIAMS, LLP
1015 Fifteenth St., N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600

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